James Brown Scott, whose influence has been creative in all of this work with reference to international relations. Dr. Scott, on this occasion, represents the American Society for Judicial Settlement of International Disputes.

THE NATURE AND FORM OF THE AGREEMENT FOR THE SUBMISSION OF JUSTICIABLE DISPUTES TO AN INTERNATIONAL COURT

ADDRESS OF JAMES BROWN SCOTT,
Lecturer on International Law at Johns Hopkins University

Mr. Chairman, Ladies and Gentlemen: I suppose after the very careful and scholarly address that we have heard tonight, stating very fairly, squarely and frankly the difficulty in the settlement of international disputes by means of a judicial tribunal, that it becomes one to be somewhat modest in stating the possibility of a submission of justiciable disputes.

And yet, even admitting that the difficulty is just as great as has been stated, that is all the more reason why we should take it up, carefully consider it, and study it, in order that we might find some way of defining justiciable disputes, and, when defined, of submitting them to the decision of an international tribunal.

I am not at all pessimistic as to the outcome or as to the future of international law. I believe it exists, notwithstanding the fact that the newspapers tell us today, and that speakers proclaim from almost every platform, that it is a non-existent thing. I am strengthened in my belief that it is a system of law existing here and everywhere when I find that each belligerent appeals to international law as the test of the validity or the propriety of the action of its enemy; because if international law does not exist as a system, the appeal to it is futile, is nonsensical. The nations appealing to international law and denouncing its violation by the enemy, know perfectly well what they have in mind, what principles exist, and what principles have been violated. And the enemy of the belligerent so appealing to international law likewise appeals from the same standard.

I regret, of course, that it may seem necessary to refer, for the proof of a system, to its violation. But I have put the existence of international law upon the lowest possible level, namely, that those

nations that do not observe it nevertheless appeal to it as the standard of action.

In the next place I know, and I take it we all know, if we reflect, that it is just such times as this that always have produced international law. Mr. Root, last night in his address, and Mr. John Bassett Moore, in his address, stated that the horrors, the hardships and the unspeakable brutalities of the Thirty Years' War, when law seemed to have been thrown to the winds, resulted in the formation of principles of law, whose reasonableness appealed to the nations and laid the foundation of the system of modern law between the states which we call either the law of nations or international law.

I believe that just as the greatest possible progress resulted from the Thirty Years' War, in which international law or the rules supposed to have effect between nations were violated, so I believe that there will result from the present war a great development in international law, and the desire to conform the actions of nations to its principles. I am optimistic enough to look forward to the development of a sanction for the observance of the rules of international law for the future as a result of this conflict, just as a system of international law was the unexpected but greatly welcomed result of the horrors and unspeakable misdeeds of the Thirty Years' War.

But I am not here tonight, Mr. Chairman, to speak on that subject. I was unwilling, however, to allow it to pass, to allow the statements of the preceding speaker to pass, without at least confessing my faith in the existence of the system, and in the certainty of its development in the future; because a standard of conduct, a system of international law, is absolutely necessary to the existence and to the regulation of states, and being necessary, it will come into being. I have no fear whatever of the future; I merely have, if I may say so, a fear and a horror of the present.

Now, Mr. Chairman, I take it that before we are to reach an agreement, before we are to propose an agreement for the settlement of justiciable disputes, we should at least know what international disputes are. The preceding speaker did not venture to define justiciable disputes; he contented himself with the difficulties involved in reaching a conclusion, difficulties in analyzing the elements that might enter or should enter into the definition of justiciable disputes.

I will make, merely for the purpose of this address, not a definition, but a statement, that a justiciable dispute is one which in the ordinary

course of events can be presented to a court of justice—that is, presented to a court of justice and is decided by a court of justice. What a justiciable dispute is, is a legal question, and is a question for a court to settle. If you discuss this question with European jurists or publicists they will tell you very frankly and very honestly from their standpoint that the nations themselves must decide what is or what is not justiciable, and that a court can not decide properly what is or is not justiciable, and that nations would not be justified in submitting a question as to the nature of a justiciable dispute to an international tribunal.

The answer to that is that the Supreme Court of the United States has been in the habit for the past century or more of passing upon disputes of a justiciable nature, and that when the court finds that a particular case presented to it is political, it refuses to take jurisdiction. When it finds it is a justiciable dispute and that its jurisdiction is large enough to include this particular dispute, it accepts jurisdiction of it and decides it. In confirmation of this I refer merely to the recent case, from the State of Oregon, where the Supreme Court declared the condition involved in its submission to be political, and refused to assume jurisdiction.[1]

If the states are unwilling to refer to an international tribunal the question as to what shall be considered justiciable disputes, they may declare in the agreement that certain transactions, certain conflicts, certain differences, shall be regarded, for the purposes of the agreement, as justiciable. In other words, that they will be presented to the tribunal for decision, and that they will abide by the decisions of the tribunal.

I would say, therefore, that it seems to me a definition is possible. Although it may not be a scientific definition it may at least be a workable one, because courts of justice have separated the elements, or are in a position to separate the elements, that enter into a dispute, and putting aside the political elements to enter into a settlement of merely justiciable disputes.

But if the agreement is to be entered into, it should be kept, and there should be some assurance that an agreement to submit justiciable disputes will be observed by the parties to the agreement. How is this to be done? There are various ways of approaching the question.

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[1] Pacific States Telephone and Telegraph Co. *v.* Oregon, 223 U. S., 118.

We sometimes make treaties without any time limit; the treaty declares that it is to be perpetual, or the fact that there is no time limit involves the consideration that it is to remain in effect and that a right is not given to either of the contracting parties, if there be two, or any of the contracting parties, if there be many, to abrogate or to modify the treaty.

I should think that in a question where we are, as it were, upon untried ground, the part of wisdom would be to limit the agreement to the minimum. That is to say, to select, if you choose, certain restricted categories; to agree to submit these categories to an international tribunal, limiting, if it be thought advisable, the duration of the agreement to a certain period of years, with the further clause that it may be continued from year to year if not denounced at a particular time. My purpose is not to make it difficult for nations to observe their agreements, but to make it very easy to observe them by limiting them in scope and extent of time.

Again, I should think that another very important consideration is that it should be clearly understood that when the agreement is entered into, whether for a period or without a determinate period, it is to be observed. And here we are upon recognized ground.

Without attempting to enter into the difficult and complicated technicalities inhering in this part of the subject, I would like to say that in 1870 Russia took advantage of the Franco-Prussian war to abrogate by its own action, the provision of the treaty of the Congress of Paris, forbidding the presence of Russian war vessels in the Black Sea. That action appeared to have shocked the conscience of Europe, with the result that a conference was held in London and a solemn declaration promulgated in the following form:

> The signatories of the Treaty of Paris [mentioning them by name, the principal ones being France, Prussia, Great Britain, Italy—then Sardinia, Austria-Hungary, Russia] recognize as an essential principle of the law of nations that no Power can repudiate treaty engagements or modify treaty provisions, except with the consent of the contracting parties amicably obtained.

It is no answer that treaties existing some fifteen or sixteen months ago have been violated. Solemn agreements are often violated, but that is no reason why agreements should not be made. It is a reason why some method should be devised in order to secure the observance of treaties.

It is fair to say that no matter how strong the present, or any Power at present, no Power and no combination of Powers is stronger than the past; and the past has declared in favor of these things, and when nations return to their senses they will themselves declare in favor of these things, and little by little they will be more inclined to observe them, when they find, as no doubt they are finding, that the way of the transgressor (without stopping to define who is transgressor) is hard, very hard.

Now, in the next place, we will consider the form of the agreement. Here, again, we stand upon recognized ground. We do not need anything new; we simply need to refer to the past. The best example I can give you of the form of an agreement of this kind is from the Universal Postal Convention, to which the independent nations of the world and self-governing colonies are parties. It is provided in the Postal Convention, signed at Rome May 26, 1906, that in case of disagreement arising between or among any of the signatory Powers, the dispute in question shall be referred to arbitration, and the form of the arbitration is specified. May I read you the exact language of the agreement:

> 1. In case of disagreement between two or several members of the Union, relating to the interpretation of the present convention or to the responsibility of an administration arising from the application of the said convention, the question in dispute is regulated by an arbitral judgment. For this purpose each of the administrations concerned chooses a member of the Union not directly interested in the matter.
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> 2. The decision of the arbiters is rendered by an absolute majority of votes.
>
> 3. In case the votes are equally divided, the arbiters choose, to decide the difference, another administration equally disinterested in the dispute.
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> 4. The provisions of the present article apply equally to all arrangements concluded by virtue of Article 19 of this convention.[2]

In other words it would appear, that in order to reach an agreement for the submission of justiciable disputes, we may follow the example of the Universal Postal Convention, and form by compact what might be called a justiciable union, a judicial union, or a juridical union, as

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[2]Translated from *Recueil des Traités du XX^e Siècle,* 1906, p. 340.

you may prefer; that all parties so forming the union shall agree to submit their disputes of a certain character, to wit, justiciable disputes, the instrument of submission to prescribe the form of treatment which they shall receive. If the disputes are to be submitted to arbitration, then arbitrators should be appointed. If the disputes in question are justiciable and are to be submitted to a court, then the nature of the court and its composition might be stated.

The difficulty about agreements of this kind is that they do not create machinery and have it in existence at the very time when disputes are to be submitted, and they leave the tribunal to be constituted at the very time when the nations are in the least inclined to constitute it. In other words, they attempt to thatch their house or roof in a storm, which is not regarded as good policy.

Now you might ask, and it is a very fair question: Suppose the agreement has been entered into and limited in the manner I have proposed, what guarantee are we to have that the nations will submit their disputes? To be sure, they have entered into an agreement so to do, but we know that agreements are violated, have been violated and undoubtedly will again be violated in the future. Mankind has not been made perfect by statutes, and nations will not be perfected by international compact. What should we attempt to do in this case? Should we attempt to provide some means of enforcing the resort to submission? Many people whose judgment is entitled to great respect believe that there should be something approximating a league of peace, enforcing the submission of disputes to arbitration before there can be a resort to arms. Others, whose opinions are equally entitled to respect, such as the honored gentleman who spoke here last night, Mr. Root, seem to be of the opinion that the one solution is the development of a public opinion strong enough and insistent enough to secure the submission—and if I remember aright, he went so far as to say that public opinion was the ultimate force.

Again, it may be said that if the submission has been made and the judgment rendered, how can we rely upon compliance with the judgment, because it is a futile thing to negotiate a treaty and to submit a dispute to a tribunal, when the judgment of that tribunal is not to be observed. The answer to that, at least one answer to that, is that since the reëntry of arbitration into the world by the Jay Treaty, there is really no well authenticated case of a refusal to abide by a judgment. There have been some refusals to submit to arbitration, but when

the nations have agreed to submit to arbitration and actually have done so, they abide by the decision of the tribunal of their own choice.

It is frequently said that it is impossible to render an agreement effective unless there be force behind the tribunal to execute its decrees, to which I would reply that the duty of a court is to judge. The duty of lawyers is to ascertain the law and to apply it. It is not the duty of a court to enforce its decisions. It is not a judicial duty. That is a duty of the executive.

But that does not reach the question. The Supreme Court of the United States has decided, not once, but a number of times, and upon careful, solemn deliberation, that there is no power in the Government of the United States, or in any department thereof, to enforce a judgment of the Supreme Court of the United States against a State of the American Union. That was laid down especially in the case of Kentucky v. Dennison, 24 Howard's Reports, at page 66, and the material portion of that judgment I shall read: "But if the Governor of Ohio refuses to discharge this duty," a duty of extradition laid down and prescribed by the Constitution of the United States and enforced by an Act of Congress of 1793, "there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him."

But, going back for a moment, it may be said that there is in the United States a power to compel a State to appear before the Supreme Court and litigate in a suit brought. If a suit is brought by State A against State B in the Supreme Court of the United States, and State B does not appear, judgment is taken by default, and therefore there is some compulsion. But if we bear in mind the judgment of the court in the Dennison v. Kentucky case, that there is no power to enforce a decision of the Supreme Court against a State of the American Union, it is seen, I take it, that the idea of compulsion is an illusion in such cases.

Without attempting to express a positive opinion on a matter which is a source of great doubt and perplexity, I would venture to suggest that, although it would be better if some method could be devised of enforcing the submission of justiciable disputes agreed to be submitted, and although it would be in the interest and well-being of nations to provide some force to secure the execution of such international judgments, if they be rendered and not obeyed, nevertheless my point is that we should not be deterred by the fact that there is no known means

at present of forcing submission of justiciable disputes, or of securing compliance with the judgment of an international tribunal. And I cite with very great confidence the experience of the United States that in this close Union of ours it has been found possible to institute a court in which a State may sue a State without investing the Government, or any department thereof, either with the power of haling a State into court, or of executing a judgment of the court against the State.

Of course international machinery providing for both of these contingencies would be very much more efficacious if the remedy or proper means could be found. But the mere fact that such can not be found or has not been found at present does not seem to me to be a deterrent against an agreement to conclude a convention of the kind specified, the most restricted, if you please, in its scope of justiciable disputes; trusting to the good faith of nations to observe their agreements, carefully entered into; and seeking in every country of the world, or certainly in every country a party to this agreement, to educate a public opinion which shall be so strong and so insistent, that the terms of a treaty limited in scope and limited in extent of time, subject to revision as experience shows, shall be observed throughout its existence, and that the disputes included in the categories of submission shall be submitted.

I know, in the ultimate result, no power stronger than the power of public opinion. The framers of our Declaration of Independence spoke of the decent respect to the opinions of mankind, and the decent respect to the opinions of mankind which they observed is still a force in the world, and I believe that the issue of every White Book, Orange Book, Yellow Book and every other colored book issued by the foreign offices of the different countries, is a tribute, is an appeal to this respect to the opinions of mankind, to secure by such submission an appreciation of the justness of its cause. And I believe that the respect of submission to the opinions of mankind is growing, is destined to grow, and, in the long result, is the one firm, although intangible, method of securing international agreements, just as the decent respect of the opinions of our neighbors is one of the greatest, if not the greatest, means of securing compliance with the moral and legal code, written or unwritten.

The CHAIRMAN. The last topic for the evening is "Is a uniform law of neutrality for all nations desirable or practicable? If so, what

are the principles upon which such a law should be based, and what generally should be its provisions?" which is to be discussed by Professor A. de Lapradelle, of the University of Paris, representing the American Society of International Law.

I suppose there has not been a day in the history of the American Republic from the day LaFayette placed his foot upon our soil, when a Frenchman was not welcome among us. There is not a heart in our country that does not go out in admiration and affection to France at this stern hour. We are very glad indeed to welcome to this platform Dr. de Lapradelle.

THE UNIFICATION OF THE LAWS OF NEUTRALITY*

ADDRESS OF A. DE LAPRADELLE,
Professor of International Law in the University of Paris

The lack of a sanction is not at the present moment the only imperfection in international law. Not only is it a grave matter that most definite conventions and the best established principles are in danger in the recent state of international relations of remaining pure formula, or scraps of paper, but it is a no less serious matter that on certain points even the content of international rules, apart from all questions of sanction, has not been recognized with certainty. That precision of juridical rules which is necessary for the security of juridical relations is still lacking in international law. Not that there are wanting in various countries very precise and clear rules on a certain number of problems, but these rules contradict each other and the more precise they are the more thoroughly are they in opposition to other rules. That is to say, international law is still in many respects in the purely national phase of its development. States determine it in a manner purely unilateral or individual, in laws, decrees, ordinances, and other acts which emanate from their sovereignty. They apply it either in their prize tribunals or in their national courts of justice. For want of a common legislative organ, or at least of a superior international jurisdiction, they are themselves both legislators and judges in questions in which, on the contrary, they ought to be subject to a legislator or a judge. Now the national legislator or judge has a natural tendency to shape international law according to

*This paper was delivered in French, and an English version supplied by the author.